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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN E. BURGESS,
Petitioner,

v.

GEORGE G. LOGAN, DAVE ADAMS, KEN DEVOE, GREG OLZAK, RICHARD ROGERS, DENNIS ANDERSON, ANDY KROTIK, TOM LIBERTY, MOHAMMED KHATHAMI, JOHN HAUG,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN E. BURGESS
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Atwater, California 95301
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Pro se

38 pp

QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Was the lower court obligated to adjudicate the matter of the theft and conversion of $1,909.00 by George G. Logan?

2. Was petitioner entitled to discovery?

3. Did the lower court misstate the law and the facts of the case in order to reach a pre-determined result?

4. Was petitioner entitled to jury trial?

PARTIES BELOW

Petitioner John E. Burgess was the plaintiff-appellant in the court below. Respondents George G. Logan, Dave Adams, Ken Devoe, Greg Olzak, Richard Rogers, Dennis Anderson, Andy Krotik, Tom Liberty, Mohammed Khathami, and John Haug were defendants-appellants in the court below.

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PETITION FOR A WRIT OF CERTIORARI

John E. Burgess, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on August

28, 1997, rehearing denied October 20, 1997, denying petitioner a jury trial and a good-faith determination of the *issues* that he *raised*.

OPINIONS BELOW

The Court of Appeals' unreported opinion is reproduced on pages 3a-6a of the Appendix to this certiorari petition (hereafter "Pet. App."). The unreported Order denying rehearing is reproduced is reproduced at Pet App. 1a-2a. The unreported District Court Order is reproduced at Pet. App. 7a-17a.

JURISDICTIONAL STATEMENT

The Court of Appeals opinion was entered on August 28, 1997. A petition for rehearing was timely filed and denied on October 20, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Seventh Amendments to the United States Constitution and 42 U.S.C. § 1983.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put

> in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The facts in this case are given by date:

June 1992

Plaintiff John E. Burgess and Gladwin Ensz entered into an informal agreement whereby Ensz would initiate and complete the application process with the City of Atwater for the subdividing of property owned by Burgess, later to be known as Cottage Gardens. When a final subdivision map was recorded, Ensz was to buy the lots as he built on them. Plaintiff Burgess could sell to no one else.

March 8, 1993

A tentative map was approved by the Atwater City Council. Said map consisted of fourteen house lots, a privately owned common drive and other common areas. Improvement Requirement No. 3 of Resolution No. 1065-93 stated, "That the applicant will form a maintenance district to provide for maintenance of all common spaces and repair of lights within the subdivision. . ."

June 1, 1994

Plaintiff signed the owner's consent statement on the final map.

June 1994

The City Engineers Statement on the map was signed. It said, "I, John A. Haug, City Engineer for the City of Atwater, State of California, do hereby state that I have examined this final map of 'Cottage Gardens,' and that it substantially conforms to the approved tentative map and the conditions of approval thereof, that the map meets all provisions of the Subdivision Map Act and the Atwater Municipal Code, and that this map is technically correct."

June 27, 1994

The final map was approved and accepted by the Atwater

City Council and was recorded on the 19th day of August 1994. The final map indicated that the privately owned common drive and other common areas on the tentative map had been deleted. What had been the private drive was now a public street dedicated by this final map. The other common areas no longer existed.

A letter from defendant, City Engineer John Haug addressed to Honorable Mayor and members of the City Council, stated in part. "The map has been checked and is approvable . . . The various conditions of the tentative map have been met or addressed . . . RECOMMENDATION: . . . 1. Approve the Final Map . . . 3. Direct the City Engineer to prepare the necessary reports for the establishment of the proposed Cottage Gardens Lighting and Drainage Maintenance Area, the Cottage Gardens Street and Landscape Maintenance . . . 6. Authorize the City Clerk to transmit the Final Map . . . to the office of the Recorder of the County of Merced for filing."

The Minutes of the Atwater City Council show all recommendations accepted and acted upon.

September 15, 1994

Plaintiff received a letter from the defendant, City Engineer, John Haug requesting that he sign a prepared statement waiving his rights and approving "assessment(s) to be levied on the subject property."

October 10, 1994

A public hearing was opened at the Atwater City Council Meeting. There were no notices of this meeting sent to the property owners as required by code. The hearing was continued at the request of Ensz.

A letter of this date from the City Engineer to the City Council stated in part, "At the time of approval of the Final Map for the subject subdivision, the City Engineer was to have presented a report on these maintenance districts. These reports are attached hereto."

October 24, 1994

Again the public hearing was opened and continued because there had been no notification. Plaintiff was told that it would be on the November 15, 1994 agenda.

November 15, 1994

Plaintiff attended the City Council meeting. There was nothing on the agenda pertaining to the Cottage Gardens subdivision.

November 28, 1994

Again no notices of a public hearing were sent out but a public hearing was opened. Plaintiff stated that as property owner he had not been notified as required and asked that the issue be taken off the agenda and not put back on until plaintiff so requested. Hearing was closed.

November 30, 1994

Defendant, City Attorney George G. Logan signed a Notice of Violation.

December 1, 1994

Plaintiff received a letter from defendant George G. Logan which informed plaintiff that defendant Logan was recording the enclosed Notice of Violation as of this date. It was recorded.

The recorded Notice of Violation stated that plaintiff had

failed to perform condition No. 12. Condition No. 12 was a condition recommended to the city council regarding the maintenance of "common facilities" on the tentative map. There was no such condition on the Final Map. There are no common areas on the Final Map. The maintenance districts regarding the Final Map were proposed.

December 1994

A letter from the chief title officer of Stewart Title Co. was presented by plaintiff to the Atwater City Council. The letter said, "There is no common area in this subdivision." Plaintiff requested, in view of that statement, that they void the Notice of Violation and allow building permits to be issued. Plaintiff asked who was responsible for the notice being filed. Defendant George G. Logan said he was. Plaintiff asked. "Do you mean that you did this solo, of your own volition without any request or instruction from anyone?" He replied "Yes."

December 7, 1994

Ensz submitted a written request addressed to the Atwater Building Department. It was returned with the following reply, "This property is in violation of P.C. 385-93. No permits are to be issued." Signed, George Logan.

December 21, 1994

Ensz had his lawyer, Bernerd Libanti, send defendant Logan a letter.

January 12, 1995

Bernerd Libanti sent another letter to defendant George G. Logan telling him that he had received no reply to his previous letter.

Ensz submitted a letter to defendant, City Manager Dave Adams, requesting building permits. In this letter he referred to Sec. 16.52.020 through 16.52.050. Said code sections require that a Tentative Notice of Violation be issued before a Final Notice of Violation is recorded.

January 13, 1995

Ensz submitted a request to defendant, City Manager Dave Adams, for an answer to his letter of January 12, 1995.

January 16, 1995

Ensz submitted another request for permits to defendant Dave Adams.

January 17, 1995

Defendant George G. Logan sent plaintiff a letter stating "Pursuant to your request . . . and Section 16.52.050. you are hereby notified of a hearing . . . February 27, 1995. . ."

Ensz submitted a request to defendant George G. Logan for building permits.

January 23, 1995

Ensz submitted a letter to defendant Dave Adams demanding permits based on Sec. 16.52.020.

Plaintiff submitted a letter to defendant City Manager Dave Adams demanding that, "You as the Executive Director of the City of Atwater take whatever action is necessary by 3:00 PM this date to make building permits available."

Plaintiff sent defendant Logan a reply to his letter of January 17, 1995. The letter said, "Contrary to the statement

in your letter, pursuant to your request . . . I have not made any request of you or anyone else regarding the Cottage Gardens Subdivision."

Plaintiff addressed the City Council in session and advised and explained everything that is heretofore contained in this statement of facts.

January 26, 1995

Plaintiff delivered a letter to the City Manager and the City Council telling them that he had been penalized pursuant to the unlawful notice as if it had been lawful notice and made reference to Sec. 16.52.020 Atwater Municipal Code.

January 27, 1995

Plaintiff requested the City Clerk to let him review a current Atwater Municipal Code. The latest posting to the "Code Revision Record Sheet" is dated "88-89."

Plaintiff delivered a letter to the Atwater City Council telling them that there was no current code available and asked when and where he might have had a current copy made available.

February 27, 1995

Council opened a public hearing for "Consideration of recording a final notice of non-compliance on Cottage Gardens Subdivision." Plaintiff told the council "I would like to go on record as advising this Council that they should read before they make a decision and thoroughly understand Section 16.52.020 through 16.52.050 . . . of the Atwater Municipal Code. I wish to go on record as saying that that section has not been complied with." Plaintiff pointed to particular parts of the Cottage Gardens Subdivision Map on

the wall and said, "I think it would be in the Council's best interest to know what that means before they vote on it. If you don't have a thorough understanding of what it means, you should not be voting on that." The members of the Council voted unanimously to file the final notice of violation.

March 6, 1995

Defendant George G. Logan named plaintiff as a cross defendant in response to a writ of Mandate that had been filed by Ensz. A Request For Dismissal, without prejudice, for the Cross-complaint only, was filed by Logan on July 19, 1995.

March 27, 1995

The City Council adopted Resolution No. 1220-95. The resolution said in part, "1. On March 8, 1993 this Council . . . approved the Cottage Gardens Subdivision." (The subdivision was approved on June 27, 1994). "The applicant . . . recorded the Final Map . . ." (The City Council authorized the City Clerk to transmit the map for recording and she did). "6 . . . Plaintiff asked some questions, but offered no argument." (See quotes by plaintiff February 27, 1995.) "9. John Burgess. . . wrongfully caused the Final Map to be recorded . . ." (Plaintiff submitted the Final Map, the Council caused the Final Map to be recorded when they instructed the City Clerk to transmit the map for filing). "10. The City Attorney is hereby ordered to record a Final Notice of Violation as regards this subdivision." (This was the third Final).

June 13, 1995

Plaintiff filed a Complaint For Damages in The Superior Court in Merced County, California. Upon learning that California Government Code Section 821.6 states, "A public employee is not liable for injury caused by his instituting or

prosecuting any judicial or administrative proceeding within the scope of his employment, even if he does so maliciously and without probable cause." plaintiff dismissed without prejudice. The dismissal was filed on October 19, 1995.

October 26, 1995

Defendant George Logan filed a Memorandum of Costs with the Superior Court when in fact, no costs were incurred.

December 18, 1995

A judgment was issued in favor of the "defendants" for $1820.00.

January 9, 1996

A writ of execution was issued naming the singular defendant George Logan as judgment creditor. The other defendants were not named or mentioned.

January 29, 1996

A Notice of Levy was delivered to plaintiff's bank. This levy identified George Logan as the defendant, in pro per. Plaintiff's account was debited $1909.00 for levy.

February 2, 1996

Plaintiff informed defendant Mayor Devoe, by return receipt letter, that the City Attorney had been given a fraudulent judgment against the plaintiff for costs.

March 29, 1996

The Merced County Marshals Office informed plaintiff that a check had been made payable to George Logan pursuant to the levy.

April 6, 1996

Defendant Dennis Anderson stated that he had never heard of the above mentioned $1,820.00.

April 9, 1996

Plaintiff filed a complaint with the Merced County District Attorney stating that he had been defrauded of $1,909.00. The District Attorney's Office signed for the letter but has never responded.

May 13, 1996

Plaintiff reviewed the case file index, and found that the only fees that were paid were paid by plaintiff Burgess.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Ninth Circuit's decision, is indicative of the legal anarchy that has prevailed in the Ninth Circuit Court of Appeals for some time. Other Circuits for the most part, follow Supreme Court precedent. The Ninth Circuit, in 1996 alone, was reversed in 28 out of 29 cases before the Supreme Court. See *Los Angeles Times*, Tuesday, August 5, 1997.

I.e., the Ninth Circuit is wrong 97% of the time that this Court chooses to review the case. This case is no exception. In fact, it appears that none of the Ninth Circuit Court of Appeals judges involved in adjudicating this action so much as bothered to *read* any of petitioner's briefs.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR PRONOUNCEMENTS.

[T]he agency has no discretion to exercise over Suitum's *right* to use her land. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 (1997).

The City of Atwater had no discretion to conduct itself in the fashion in it did. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) and *Nollan v. California Coastal Com'n*, 107 S. Ct. 3141 (1987) for excellent discussions exactly on point in petitioner's case completely ignored by the Ninth Circuit Court of Appeals. See also James W. Ely, Jr., *A Breather on the Takings Clause*, 82 ABA Journal 42 (Jan. 1996).

Respondent City Attorney George G. Logan had even less right to sign a Notice of Violation and enter fraudulent documents into California Superior Court records in order to *steal* money from petitioner's bank account.

Respondent Logan was (1) acting under color of state law in his position as City Attorney, (2) deprived petitioner Burgess of his property, money in a bank account, (3) without due process of law. See 42 U.S.C. § 1983.

To compound the problem, the Ninth Circuit in footnote 2 of the August 28, 1997 Order, see Pet. App. 6a, simply adds to the confusion of the issues with its Alice-in-Wonderland language:

> . . . Logan improperly retained the judgment of costs . .

Alice-in-Wonderland was a world in which words had no meaning. *Welch v. United States*, 90 S. Ct. 1792, 1803

(1970).

In English, defendant Logan used *fraud* to *convert* this petitioner's money to his own account.

> . . . Burgess *may not* have exhausted his state court remedies.
>
> Pet. App. 6a

In English, "may not" is *speculation*. Courts are supposed to rule on *facts* and *law*.

42 U.S.C. § 1983 requires *no* exhaustion of "state court remedies." Besides which, no state court remedies exist in petitioner's situation. See California Government Code Section 821.6.

The actions of respondent City Attorney George G. Logan can hardly be characterized as "pendant (sic) state claims." See Pet. App. 6a. The citation of *Levald v. City of Palm Desert*, 998 F.2d 680, 692 (9th Cir. 1993) can most charitably be described as irrelevant and most accurately be described as dishonest.

II. THE DECISION BELOW DEALS WITH IMPORTANT AND RECURRING ISSUES.

There are two basic ways to arrive at a judicial decision:

> Let justice be done though the heavens fall.
>
> Lord Mansfield in *Rex v. Wilkes*, 4 Burrow's Reports 2527, 2562 (1768)

Or :

> It is not the technical legal conception that leads to the decisions pronounced by the judge, but it is the decision which the judge intends to pronounce which lead him to the finding of the technical reasons therefor--the decisions themselves being the result of the judge's views on the social and economic questions involved in the solution of the apparently abstract constitutional problems.
>
> Louis B. Boudin, *Government by Judiciary*, Vol. I, page 338 (1932)

The Ninth Circuit Court of Appeals appears to have crafted a third way: ignore and/or rewrite the facts in combination with studiously avoiding the Constitution of the United States, statutes enacted by Congress and Supreme Court Decisions.

Other federal courts have acknowledged the control which previous Supreme Court decisions have upon their own rulings.

Generally, "[w]hen an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Close v. State of New York*, 125 F.3d 31, 38 (2nd Cir. 1997)(citation omitted).

Although ordinarily a panel must adhere to prior decisions of this court, our first duty is to follow the dictates of the United States Supreme Court. *United States v. Thevis*, 665 F.2d 616, 626 (11th Cir. 1982).

The decisions of the United States Supreme Court, whether right or wrong, are supreme: they are binding on all the courts of this land. *Hoover v. Hulston Valley Community Hosp.*, 545 F.Supp. 8, 13 (E.D. Tenn. 1981).

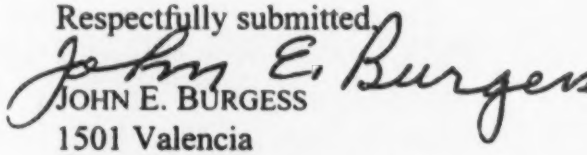
Canon 1 of the Code of Judicial Conduct states that "independent and honorable judiciary is indispensable to justice in our society." Canon 2 provides that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, . . ." *Gay v. United States*, 93 S. Ct. 2152 (1973)(dissent).

The Ninth Circuit Court of Appeals is tottering on the brink of bringing that public confidence to the nation's all-time low unless the judges therein quit confusing judicial independence with personal independence to act capriciously, deciding cases on any basis other than the laws that are applicable and the facts as they are known.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



JOHN E. BURGESS
1501 Valencia
Atwater, California 95301
(209) 358-5803

Pro se petitioner

Dated: January 16, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-16680

JOHN E. BURGESS
Plaintiff-Appellant,

v.

GEORGE LOGAN; DAVE ADAMS; KEN DEVOE; GREG OLZAK; RICHARD ROGERS; DENNIS ANDERSON; ANDY KROTIK; TOM LIBERTY; MOHAMMED KHATHAMI; JOHN HAUG,
Defendants-Appellees.

Petition for Rehearing and Suggestion for Rehearing En Banc

Decided and Filed October 20, 1997

ORDER

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

The panel denies appellant's petition for rehearing and rejects the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-16680

JOHN E. BURGESS
Plaintiff-Appellant,

v.

GEORGE LOGAN; DAVE ADAMS; KEN DEVOE; GREG OLZAK; RICHARD ROGERS; DENNIS ANDERSON; ANDY KROTIK; TOM LIBERTY; MOHAMMED KHATHAMI; JOHN HAUG,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior District Judge, Presiding

MEMORANDUM*

Submitted August 25, 1997 and Filed August 28, 1997**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34 (a); 9th Cir. R. 34-4. Accordingly, Burgess's request for oral argument is denied.

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

John E. Burgess appeals pro se the district court's Fed. R. Civ. P. 12(b)(6) dismissal of his 42 U.S.C. § 1983 action against employees of the City of Atwater, California ("City"), regarding approval of his land subdivision. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), *see Federation of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996), and we affirm.

In the district court, Burgess alleged that defendants deprived him of his constitutional rights to due process and equal protection and subjected him to a conspiracy to violate his civil rights. The City argued that Burgess's claims in federal court were barred by the collateral estoppel effect of two prior state court actions in which Burgess was a party. We agree.

The record indicates that Burgess and his co-developer, Gladwin Ensz, had a dispute with the city regarding approval of their proposed subdivision. Ensz brought a state court action in which he obtained the necessary permits, although he and the City stipulated that the City "its officers and employees have committed no wrongful acts as concerns the properties in question." Burgess later filed and dismissed a state court action raising nearly identical claims of wrongdoing by the City.

We conclude that Burgess's present action is barred by the doctrine of collateral estoppel. Federal courts are required to

give "full faith and credit" to state judicial proceedings. *See* 28 U.S.C. § 1738; *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir. 1990) (per curiam); *see also U.S. v. Real Property Located in El Dorado*, 59 F.3d 974, 979 n.3 (9th Cir. 1995) (noting that we may consider collateral estoppel sua sponte in order to affirm a district court's decision). In determining whether a prior state court action bars a subsequent federal action, the federal court must look to the res judicata principles of the state court in which the judgment was rendered. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 80 (1984). Federal courts give preclusive effect to issues decided by state courts when a party from a prior state court proceeding attempts to relitigate identical issues in a subsequent federal proceeding. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Thus, we look to the California state law and give the state court judgment the same preclusive effect as would California courts. *See Gilbert*, 900 F.2d at 1410.

"Under California law, '[a] party is collaterally estopped from relitigating an issue previously adjudicated if: (1) the issue necessarily decided in the previous suit is identical to the issue sought to be relitigated; (2) there was a final judgment on the merits of the previous suit; and (3) the party against whom the estoppel is asserted was a party, or in privity with a party, to the previous suit.'" *In re Russell*, 76 F.3d 242, 244-45 (9th Cir. 1996) (quoting *In re Joshua J.*, 46 Cal. Rptr. 2d 491, 497 (Ct. App. 1995)). "California courts find privity where one party so identifies with another that he represents the same legal right." *Id.* at 245 (citing *People v. Drinkhouse*, 84 Cal. Rptr. 773, 776 (1970)).

Here, we conclude collateral estoppel applies because the issue litigated in Ensz's superior court action is identical to the issue at the crux of Burgess's complaint. *See id.* at 244.

The superior court judgment, in which both parties stipulated there had been no wrongdoing on the part of the City, was final and on the merits. *See id.* Burgess had been named as a cross-defendant in the superior court action and, as the co-developer of the subdivision, he was clearly in privity with Ensz. *See id.* at 245.[1]

Accordingly, we conclude that the district court did not err by dismissing Burgess's action. *See Federation of African Am. Contractors*, 96 F.3d at 1207.[2]

AFFIRMED.

---

1 Burgess's claimed violations of his due process and equal protection rights are merely collateral challenges to an adverse state court proceeding for which the district court lacked subject jurisdiction. See *Branson v. Nott*, 62 F.3d 287, 291 (9th Cir. 1995); see also *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 362 (9th Cir. 1993) (holding that failure to plead federal constitutional claims in a state court complaint does not avoid preclusion in a subsequent federal action).

2 To the extent Burgess contends that Logan improperly retained the judgment of costs in the second state court proceeding, the record indicates that Burgess may not have exhausted his state court remedies. Given the district court's dismissal of Burgess's federal claims, it did not abuse its discretion by dismissing his pendant state claims. *See* 28 U.S.C. § 1367(c)(3); *see also Levald v. City of Palm Desert*, 998 F.2d 680, 692 (9th Cir. 1993).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Civil Action No. 95-6112

Honorable Robert E. Coyle
U.S. District Judge

JOHN E. BURGESS
Plaintiff,

v.

GEORGE LOGAN *et al.*,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On August 5, 1996, the Court heard defendants' motion to dismiss. Upon consideration of the oral and written record, this court grants the motion to dismiss for the reasons stated herein.

I. *Background*

On May 21, 1996, the court granted in part defendants' Motion to Dismiss and To Abstain. The Court granted the motion with leave to amend and ordered Burgess to file a first amended complaint by June 11, 1996. Burgess was

granted leave to amend as to three specific issues: 1) whether plaintiff alleged a deprivation of a constitutionally protected interest or a deprivation his constitutional rights; 2) whether plaintiff can state a claim for denial of equal protection of the laws under section 1983; and 3) whether plaintiff can state a claim for conspiracy to violate his civil rights. After Burgess filed timely his First Amended Complaint, the defendants filed the instant motion to dismiss. Upon consideration of the amended complaint and the arguments submitted by both parties, the Court grants the motion to dismiss. The plaintiff has failed to cure the defects of the original complaint.

II. *Background of the Case*

Plaintiff John E. Burgess, proceeding pro per, has brought the underlying action for damages for deprivation of civil rights. Named as defendants are the City Manager of the City of Atwater, the Mayor of Atwater, members of the Atwater City Council, the Building Inspector for Atwater, a city planner for Atwater, the public works director for Atwater, and George Logan, the City Attorney for Atwater. The Complaint essentially alleges that a notice of violation of the conditions of subdivision approval of the Cottage Gardens subdivision was improperly issued by defendants.

III. *Plaintiff's Pro Se Status*

There are less strict pleading requirements for pro se litigants. In *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987), the Ninth Circuit explains:

> The Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants . . . 'It is settled law that the allegations of [a

> pro se litigant's complaint] "however inartfully pleaded" are held "to less stringent standards than formal pleadings drafted by lawyers . . .'" . . . This rule is particularly important in civil rights cases . . . Moreover, before dismissing an action, a court should always be certain that other less drastic alternatives are not available.

In addition, "in appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[1]

IV. *Deprivation of Constitutionally Protected Interest.*

In the earlier motion, defendants moved to dismiss the Complaint on the ground that it did not allege a deprivation of a constitutionally protected interest without due process of law. In so moving, defendants note that the Complaint did not allege that plaintiff's property was taken or rendered useless by the alleged actions of the defendants and that the Complaint alleges that defendants "damage[d] the Plaintiff in his business dealings and prospective economic advantage, was well as diminishing his profits in the Cottage Gardens subdivision." Consequently, defendants argue, plaintiff has not alleged that the alleged actions of the defendants deprived

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1 Plaintiff argues that the Seventh Amendment's right to a jury trial applies to Section 1983 actions. Therefore, Congress did not have the authority to abrogate the Seventh Amendment by enacting Rule 12(b)(6). This argument is without merit. A party who has not stated a claim upon which relief can be granted is not entitled to any trial in federal court. Rule 12(b)(6) only protects a defendant from being forced to trial in an action which has not stated a cognizable claim for relief.

him of a constitutionally protected property interest.

In the order granting leave to amend, the Court held that a delay in a subdivision approval generally does not give rise to a deprivation of a constitutionally protected property interest. Order at 6, relying on 14 C.J.S., *Civil Rights*, § 73 and *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983). In *Chiplin Enterprises*, the First Circuit, relying on *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Circuit), *cert. denied*, 459 U.S. 989 (1982), held that a complaint in which it was alleged that plaintiff had met all of the legal requirements for building permit but the city refused for no valid reason to issue for five years did not state a claim upon which relief can be granted. In so holding, the First Circuit reiterated that "[a] mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error." *Id.* at 1528. In *Creative Environments*, *id.*, the First Circuit rejected the argument that the plaintiff's right to due process was violated by the allegedly arbitrary misapplication of state law resulted in the denial of plaintiff's right to conduct a legitimate business and make a profit.

As to the instant case, the Court found the Complaint alleges the very same type of land use planning dispute at issue in the First Circuit cases. Moreover, Burgess' Complaint merely alleges a diminishment in profits similar to that alleged in the First Circuit cases. This is especially the case given the allegations that Ensz would begin to purchase the property from plaintiff as Ensz developed the subdivision parcels. Finally, plaintiff had a remedy under state law in the administrative mandamus procedures of California Code of Civil Procedure Section 1094.5 which he elected not to

pursue. Consequently, the court concluded that plaintiff did not allege a deprivation of a constitutionally protected interest or a deprivation of his constitutional rights because of the alleged actions of the defendants and granted leave to amend.

The amended complaint does not do anything to correct the deficiencies which the Court noted in the original complaint. Although the plaintiff attempts to identify his right to subdivide and sell his land as a property right, in effect the amended complaint merely rehashes the same set of facts and conclusions which this Court earlier characterized as a land use planning dispute and allegation of diminishment of profits. The Court found that set of facts was not sufficient to allege a deprivation of a constitutionally protected interest or right. For the same reason as this court granted the earlier motion to dismiss, the Court now grants the defendants' instant motion to dismiss.

V. *42 U.S.C. § 1983 Claims.*

Defendants moved to dismiss plaintiff's claims that his rights under 42 U.S.C. § 1983 were violated. The Court granted Burgess leave to amend, and advised the plaintiff that in order to state a claim for denial of equal protection under Section 1983, plaintiff must allege that the governing statutes and ordinances set forth a facially unreasonable classification or plaintiff must allege facts from which it may be inferred that he was intentionally treated differently from other persons similarly situated. *Sischo-Nownejad v. Merced County County Community College Dist.*, 934 F.2d 1104, 1112 (9th Cir. 1981); *Milikotin v. City of Los Angeles*, 643 F.2d 652, 654 (9th Cir. 1981).

The amended complaint does not allege any such unreasonable classification. Nor does the amended complaint set forth facts indicating any intentional treatment that was different from other similarly situated persons. Instead, the amended complaint alleges that plaintiff was deprived of procedural due process because he did not receive a "predeprivation notice and [was not] afforded a meaningful opportunity to be heard." However, in his statement of facts, the plaintiff indicates that he received notice of a hearing by means of letter sent to him by defendant George G. Logan. Burgess also identifies several opportunities he had to address the City Council in session. According to the plaintiff's statement of facts, these sessions occurred on January 23, 1995 and February 27, 1995. Burgess also had the opportunity to address this matter in the state court, and take appeals as provided by state law.

Moreover, there are no allegations in the complaint that Burgess was treated differently from other similarly situated persons. Nor could Burgess supply any when requested to do so at oral argument. Instead, in his opposition to this motion to dismiss, the plaintiff writes, "Plaintiff is unable to allege 'facts' at this time concerning the equal protection of the laws until he is allowed discovery. For example, does the city of Atwater treat all developers as shabbily as it has the plaintiff or did the city council members and defendant Logan 'give the treatment' only to Plaintiff Burgess?" This is not sufficient to meet the test under Sischo-Nownejad, 934 F.2d at 1112, as specified in the order granting leave to amend. Accordingly, the Court grants the defendants' motion to dismiss.

VI. *Conspiracy*

In evaluating the motion to dismiss the original complaint, the court did not agree that the allegations of the Complaint were sufficient to allege a conspiracy to violate plaintiff's civil rights. Order at 13. The Court's order noted that more than vague conclusory allegations are required to state a claim for conspiracy to violate civil rights. *Mosher v. Saalfield*, 589 F.2d 438, 441 (9th Cir. 1978). "A claim of conspiracy or action in concert requires the allegation of 'facts showing particularly what a defendant of defendants did to carry the conspiracy into effect, whether such facts fit within the framework of the conspiracy alleged, and whether such acts, in the ordinary course of events, would proximately cause injury to the plaintiff." *Hoffman v. Halden*, 268 F.2d 280, 295 (9th Cir. 1959)." *Ibarra v. Las Vegas Metropolitan Police Dept.*, 572 F.Supp. 562, 565 (D. Nev. 1983); *accord Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Reese v. Nixon*, 347 F.Supp. 314, 316 (C.D. Cal. 1972). Therefore, in light of plaintiff's repeatedly asserted position that Logan acted on his own without authority, the court dismissed with leave to amend the action against Dave Adams, Ken Devoe, Greg Olzak, Richard Rogers, Dennis Anderson, Andy Krotik, Tom Liberty, Mohammed Khathami, and John Haug.

In the Amended Complaint, the plaintiff alleges that the members of the city council formed a conspiracy at the city council meeting held on February 27, 1995. The plaintiff alleges that the purpose of that conspiracy was to deny Burgess due process, and describes the occurrence as follows in the complaint.

Council opened a public hearing for "Consideration of

> recording a final notice of non-compliance on Cottage Gardens Subdivision." Plaintiff told the council "I would like to go on record as advising this Council that they should read before they make a decision and thoroughly understand Section 16.52.020 through 16.52.050 . . . of the Atwater Municipal Code. I wish to go on record as saying that that section has not been complied with." Plaintiff pointed to particular parts of the Cottage Gardens Subdivision Map on the wall and said, "I think it would be in the Council's best interest to know what that means before they vote on it. If you don't have a thorough understanding of what it means, you should not be voting on that." The members of the Council voted unanimously to file the final notice of violation.

First Amended Complaint at 10.

The plaintiff further alleges that the members of the city council committed another overt act in furtherance of that conspiracy on March 27, 1995, as follows:

> The City Council adopted Resolution No. 1220-95. The resolution said in part, "1. On March 8, 1993 this Council . . . approved the Cottage Gardens Subdivision." (The subdivision was approved on June 27, 1994). "The applicant . . . recorded the Final Map . . ." (The City Council authorized the City Clerk to transmit the map for recording and she did). "6 . . . Plaintiff asked some questions, but offered no argument." (See quotes by plaintiff February 27, 1995) "9. John Burgess. . . wrongfully caused the Final Map to be recorded . . ." (Plaintiff submitted the Final Map, the Council caused the Final Map to be recorded when they

> instructed the City Clerk to transmit the map for filing).
> "10. The City Attorney is hereby ordered to record a Final Notice of Violation as regards this subdivision." (This was the third Final).

First Amended Complaint at 11.

The defendants now move to dismiss on the following two grounds: First, if the critical event in the purported conspiracy was the recording of the initial Notice of Violation, it is clear from the complaint that only G[e]orge Logan wa[s] involved. The defendants point out that the complaint alleges no one else was involved in the determination to perform this act. Second, if the allegedly conspiratorial events were the two city council meetings described above, then the defendants are immune from conspiracy under the "intracorporate doctrine" because the city council members were acting within the course and scope of employment.

To establish immunity under the "intracorporate doctrine," the defendants first explained that the City Council meetings of February 27, 1995 and March 27, 1995, were clearly instances in which the city council members were acting within the course and scope of their employment. The defendants then go on to argue that the "intracorporate doctrine" bars Burgess' claim of conspiracy. The problem with the defendants argument is that this doctrine has not been adopted by the Ninth Circuit in particular.

According to the "intracorporate conspiracy doctrine," a corporation cannot conspire with itself through its agents when the acts of the agents are within the scope of their employment. In circuits which have adopted it, the intracorporate conspiracy doctrine has been held equally applicable to

governmental entities. *See Larson by Larson v. Miller*, 76 F.3d 1446, 1454-55 (8th Cir. 1996). The Ninth Circuit explained, "While this doctrine has been extended by some circuits to civil rights cases, [citations omitted], other circuits have declined to do so, [citations omitted], and we have reserved the issue. *United States v. Hughes Aircraft Co., Inc.*, 20 F.3d 974, 979 (9th Cir.), *cert. denied*, 115 S. Ct. 482 (1994). Similarly, in *Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993), the Ninth Circuit noted that, "This court has never directly addressed whether individual members of a single government entity can form a 'conspiracy' within the meaning of section 1985". Although the Ninth Circuit cases cited above, and the defendants, go on to discuss at length this split of authority among the circuit courts, the point is that there is simply no Ninth Circuit authority to support the defendants arguments that the "intracorporate conspiracy doctrine" would bar the plaintiffs claims here.

Nevertheless, as discussed with reference to the other deficiencies above, if it is not possible to determine exactly what constitutional rights Burgess has been deprived of, then there can be no basis upon which to sustain a claim that there was a conspiracy among the city council members to deprive him of that right. On the basis of this Court's finding that there is no constitutional violation, this Court dismisses Burgess' claim that there was a conspiracy to deprive him of those constitutional rights.

VII. *Conclusion*

At this juncture, the Court dismisses Burgess' claims in their entirety. Despite the fact that Burgess is a pro se litigant, the Court provided him once before with an oppor-

tunity to reformulate his complaint to allege constitutional violations, section 1983 violations and conspiracy to violate his constitutional rights. The Court's order laid out exactly what requirements were needed for a valid complaint. The First Amended Complaint simply rehashes his grievances with the City Council and other city officials for failing to approve his subdivision, thereby causing him the loss of speculative profits. In concluding, the plaintiff has failed to correct in his First Amended Complaint the pleading deficiencies which this Court pointed out to him. As a pro se litigant, the plaintiff was given an additional opportunity at oral argument to correct the deficiencies in the complaint and was not able to do so. Accordingly, the Court now grants the defendants' motion to dismiss without leave to amend.

DATED: 8/6/96

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge